UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JORGE HEDDERICH, JR.,	)	
	)	
Plaintiff and Appellant,	)	
	)	CASE NO. 201
VS.	)	
	)	
EDGAR W. RICHARDS and UNITED STATES OF AMERICA	)	
	)	
	)	
Defendants and Appellees.	)	
	)	

APPELLANT'S OPENING BRIEF

Law Offices of
NEIL N. WERB
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Attorney for Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JORGE HEDDERICH, JR.,	)	
	)	
Plaintiff and Appellant,	)	
	)	CASE NO. 2012
VS.	)	
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EDGAR W. RICHARDS and UNITED STATES OF AMERICA	)	
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Defendants and Appellees.	)	
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APPELLANT'S OPENING BRIEF

This is an action on a promissory note. On or about June 6, 1957, in Los Angeles, California, the defendant, EDGAR W. RICHARDS, executed a negotiable promissory note for $21,875.00, payable to the order of RITA or HENRY ALBACHTON (ALBACHTEN). This note was to bear 6% simple interest and was all due and payable on June 6, 1961. The note was left with defendant, RICHARDS, at the

time of execution, but was delivered to the payee, HENRY ALBACHTEN in November or December of 1957.

Between the making and the delivery of the note the following events took place:

1. Assessments for Federal Income Taxes due in excess of the note were duly filed against HENRY ALBACHTEN and RITA ALBACHTEN in Ashland, Oregon, the then residence of tax payer (payee). These assessments were filed on July 26, 1957.

2. On or about July 30, 1957, by separate instrument in writing, in Guadalajara, Mexico, HENRY ALBACHTEN assigned all of his rights in the said note to plaintiff, the appellant herein, JORGE HEDDERICH, JR., in exchange for plaintiff's promise to furnish certain labor and material for development of a tract of land near Guadalajara, Mexico.

3. On or about September 30, 1957, defendant, RICHARDS, was served with a notice of levy. This levy was never released.

4. On or about September 16, 1957, plaintiff's promissory note was shown by defendant, RICHARDS, to an agent of the Internal Revenue Service, who declined to take the note.

Prior to these events and commencing in 1957, HENRY ALBACHTEN (tax payer) and plaintiff had discussed arrangements for electrical work on the tract in Chula Vista, Mexico, which ALBACHTEN was in process of developing. Plaintiff on or about July 30, 1957, agreed to furnish and supply approximately $20,000.00 worth of work and material to the project in exchange for the note with the understanding that ALBACHTEN was to pay for all other work, in cash. This latter agreement was entered into

on or about July 30, 1957. The work was done by plaintiff as agreed and the note was delivered to plaintiff on or about December 17, 1957, in Guadalajara, Mexico, after endorsement by HENRY ALBACHTEN.

Plaintiff had no knowledge of ALBACHTEN's tax problems, assessments, liens, etc. When defendant, RICHARDS, was notified in May of 1961, that the note had been negotiated to plaintiff, RICHARDS refused to pay it, because of the tax liens, claiming he did not know whether the note should be paid to the United States of America or to plaintiff. This action resulted.

The trial court found that the United States of America was entitled to priority and entered judgment in favor of the United States of America, and against plaintiff.

Plaintiff and appellant appeals on the following basis:

ARGUMENT

I

THE COURT ERRED IN ITS FINDING OF FACTS, IN FINDING THAT THE NOTE WHICH REPRESENTED THE OBLIGATION SUED UPON HAD BEEN FULLY PAID BY THE TRANSFEROR OF THE NOTE PRIOR TO THE LAW SUIT.

The Court in its Memorandum Opinion states that at the "time of the final delivery of the note to plaintiff, Chula Vista, (i. e., ALBACHTEN) owed very little" (Page 6, Lines 24 and 25 of Memorandum of Opinion).

This finding is followed on Page 4, Lines 5 and 6 of the Findings of Fact and Conclusions of Law.

Appellant contends that this finding is contrary to the evidence and is based upon a misunderstanding of the testimony of plaintiff, GEORGE HEDDERICH, JR.

The evidence shows that plaintiff and HENRY ALBACHTEN and/or CHULA VISTA entered into several agreements, all of which were in process at the same time. That except for the material and labor which was covered by the note, plaintiff's company, CASA ELECTRICA, was paid in cash. (Reporter's Transcript, Page 37, Lines 5 through 16).

The testimony that there was "very little owing" at the time of delivery of the note to plaintiff referred only to the agreements between the parties that were being paid for in cash. Any other interpretation of the evidence would result in the conclusion

that all of the contracts were being paid for in cash and that the delivery of the note was some form of bonus or gift.

The evidence clearly shows that considerable work was being done by plaintiff on this tract and it is clear that no payments were made on that part of the work for which the note was to be taken.

Therefore, the implied finding that plaintiff is not a holder in due course because "he had very little owing" is inaccurate and he should be considered as a holder in due course, without notice.

The Internal Revenue Code specifically provides that recording of the lien is not notice to a good faith purchaser of the instrument.

Internal Revenue Code Section 6323(c), Section 3672 (b), 1954.

II

THE JUDGMENT IS NOT IN KEEPING WITH THE FINDINGS IN ITS ADJUDICATION OF THE LEGAL RELATIONSHIP BETWEEN PLAINTIFF AND THE DEFENDANT RICHARDS.

The Memorandum and Order of the Court contains no decision relating to the determination of the obligation of defendant, RICHARDS, to plaintiff. The decision is for judgment for defendant United States of America with costs. (Memorandum and Order, Page 7, Lines 13 and 14).

In the Findings of Fact and Conclusions of Law (Page 6 Line 2) there is a conclusion that "plaintiff is entitled to no recovery on his claim".

Appellant contends that there are no findings to support this conclusion. The

plaintiff is either a holder in due course or he is an assignee of the note; in either case he is entitled to judgment against defendant, RICHARDS.

III

THE COURT ERRED IN ITS CONCLUSION THAT THE DEFENDANT UNITED STATES OF AMERICA WAS ENTITLED TO PRIORITY OVER THE PLAINTIFF HEREIN.

The evidence is undisputed that defendant, RICHARDS, gave a negotiable promissory note to ALBACHTEN. It is further undisputed that plaintiff is the holder of the note.

The burden of proof is upon those who deny that plaintiff is a holder in due course of the note, once it is established that the note

was duly assigned, executed and delivered and it is due and unpaid. See

Exchange Bank v. Veirs,
3 Cal App. 71; 84 Pac. 455.

See also

Calif. Civil Code Section 3107

Plaintiff therefore is either a holder in due course by virtue of the negotiation by endorsement of the instrument or he is an assignee of the instrument by virtue of a separate agreement entered into by ALBACHTEN and the appellant, wherein ALBACHTEN purported to transfer his interest in the note to appellant by a separate instrument, in writing, on July 30, 1957. In either event appellant, be he a holder in due course or an assignee for value, is entitled to recover the amount due under the note.

See

Loewy v Cherness
48 AFTR 1477

United States vs. Hartsell & Poor
1 AFTR 2d, 572

The defendant Hartsell borrowed money from the defendant Poor, who was his daughter, and executed two promissory notes. He also secured the notes with corporate stock. All of this was done while an assessment and lien was in effect.

The evidence showed that the daughter was apparently aware that the father was in tax difficulties and that he was delinquent in his taxes from 1944 to 1948. It was held there was insufficient evidence to prove that the daughter had knowledge or notice of the tax liens at the time the stock was pledged to her in 1952, even though the liens had been in existence for several years.

It was held further that the daughter was entitled to collect on the notes.

On appeal, in 3 AFTR 2d, 379; 261 F 2d, 593, it was held that the Government must establish knowledge of the lien by a preponderance of the evidence (which it had not done in this case).

IV

If plaintiff is a holder in due course, he clearly is entitled to priority over the United States tax lien, since 6323 (c) U.S.C. provides that as between a holder in due course of a negotiable instrument and the United States tax lien, the holder in due course shall prevail.

See Hartsell & Poor above

See Loewy vs Cherness above

See Plumb, Federal Tax Liens, at 194

"Even if the taxpayer still possessed the note or receipt at the time the levy is made on his debtor or bailor, absent something more, the latter may be subject to the prospect of

double liability because of the risk that the negotiable items may be subsequently negotiated."

Plumb, Federal Tax Liens, P. 47

The reason why securities are given special status was stated in:

H. R. Reports #855, 76th Congress, 1st Session, 56 (2) Cum. Bull., 504 523 (1939)

". . . it is inequitable for the statute that the filing of notice constitutes notice as regards securities . . . An attempt to enforce such liens on recorded notes would in many cases impair the negotiability of securities and seriously interfere with business transactions."

Only in the event that the taxpayer has actual notice of the lien, then the United States lien shall precede and have priority over the note. However, the holder of the note may still proceed to collection against the maker of

the instrument.

Citations: See above.

It is incumbent upon the United States Government to prove by the preonderance of the evidence that plaintiff had actual notice of the United States tax lien at the time the note was transferred to him.

See United States vs. Hartsell & Poor, above.

V

Should the evidence show that plaintiff is not a holder in due course, then even as an assignee of the instrument he should be entitled to priority over the United States Government lien. An assignee for value without notice of a United States tax lien shall be entitled to priority if the property assigned to him is taken in good faith and without notice of the lien.

Bureau of Controls -
Receivables vs U. S.
Cal 1958; 2 AFTR 2d at 5067

On August 23, 1957, an assessment was made against defendant Monmak for approximately $6,000.00, and was served on October 16, 1957. On October 15, 1957, the plaintiff sued Monmak for $1,500.00. On October 22, 1957, the defendant Parent became indebted to Monmak for the sum of $1,200.00. On October 23, 1957, Monmak assigned the debt of Parent to the plaintiff for a consideration. On November 8, 1957, a tax lien was filed and notice given to the defendant Parent. It was held that the assignee of an obligation is entitled to receive the assigned amount free of any Government lien.

Appellant contends that even if he were a mere assignee of a claim, since he took without notice of the Government lien, he is entitled to priority.

In any event, the assignee of the instrument

is entitled to collect the money due from the maker of the instrument.

See State Bank vs. Kinnett, 113 Kan. 360 214 P. 776

Stafford vs. Bored, 106 Okla, 173 233 P. 185

Watson vs. Goldstein, 176 Minn. 18 222 N. W. 509

Kent v Kent, 6 Cal. App. 2d, 488 44 P. 2d 445

Burkett vs. Doty, 32, Cal App. 337 162 P. 1042

Each case holds that the title to a promissory note may be transferred and assigned by a separate instrument in writing, and even orally, and in each case, the assignment prevailed as against general and/or attaching creditors.

VI

Plaintiff contends that the United States, by its failure to take possession of the negotiable note, having the opportunity and ability to do so,

either lost its lien as against the instrument, or is estopped to assert any priority, since by virtue of its conduct, it may have permitted a hardship or fraud to be worked upon the plaintiff.

That the United States Government has full authority and power to take possession of the note is apparent.

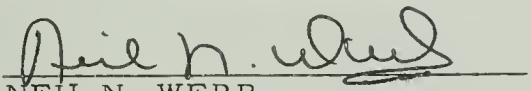
In Re: Timberline Lodge, Inc.
139 F. Sup., 13 (D.C. Ore, 1955)

Wherein it is implied that with respect to specific personal property, tax liens attach only when that property has been levied upon and seized to enforce the lien.

Appellant contends that since the Government was aware of the existence of the note, and since it had the opportunity and ability to take possession of it, or, mark it in some fashion, to prevent its negotiation, it is estopped to assert

a lien against the instrument, where to assert such right would cause damage to an innocent third party.

Respectfully submitted,



NEIL N. WERB
Attorney for Appellant

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 265 South Robertson Boulevard, Beverly Hills, California.

On November 26, 1965, I served the within

APPELLANT'S OPENING BRIEF

on the Appellees in said action by placing four (4) true copies thereof to each of the Appellees in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California, addressed

as follows:

LOYAL E. KEIR
United States Attorney
Federal Building
Los Angeles, California 90012

LLOYD F. DUNN
Attorney at Law
1245 Glendon Avenue
Los Angeles, California 90024

Robert E. Beard

Subscribed and sworn to
before me this 26th day
of November, 1965

Lee DeHerman

Notary Public in and for said
County and State.
My Commission Expires
April 5, 1966.